Nos. 82-1331, 82-1352

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION

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QUESTION PRESENTED

Whether the court of appeals was correct in upholding the Federal Communications Commission's decision to preempt state regulations that would prevent the effective implementation of the Commission's determination that all customer premises telephone equipment should be offered only on an unregulated basis.

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION

International Business Machines Corporation (IBM) submits this brief in opposition to the petitions for writ of certiorari.[1]

STATEMENT OF THE CASE

In 1980, the Federal Communications Commission decided in a rulemaking known as *Computer Inquiry II* to end traditional public utility regulation of telecommunications equipment that is physically located on a customer's premises — commonly termed customer premises equipment, or CPE. Until that decision, the Commission had allowed communications common carriers to offer the use of CPE as a regulated service, and to combine that offering with their transmission offerings under a single bundled tariff. Noncarrier suppliers offered CPE on an unregulated basis. Under *Computer Inquiry II*, carriers and noncarriers alike will offer CPE without regulation.[2]

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1. Pursuant to Rule 28.1, we construe the terms "parent companies," "subsidiaries" and "affiliates" to mean those corporations (1) the shares of which are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries" and "affiliates," a majority of the shares of which are owned by a party. IBM has no parent companies, subsidiaries, or affiliates.

2. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, *Final Decision*, 77 F.C.C.2d 384 (1980) *("Final Decision")*; *Memorandum Opinion and Order on Reconsideration*, 84 F.C.C.2d 50 (1980) *("Reconsidered Decision")*; *Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981) *("Further Reconsidered Decision")*. In its decision the Commission also ended public utility regulation of all enhanced services (which it defined as communications services involving more than pure transmission) and imposed structural and/or accounting requirements on carriers that offer CPE or enhanced services.

The Commission concluded in *Computer Inquiry II* that CPE was not properly subject to entry and rate regulation under Title II of the Communications Act of 1934.[3] It further found that the historical practice of allowing carriers to tariff CPE was no longer in the public interest because of the high level of competition that exists in the CPE marketplace.[4] The Commission found that allowing carriers to package CPE with transmission service impeded that competition and adversely affected communications users.[5] It concluded that unregulated competition in the provision of CPE would best serve the objectives of the Communications Act by promoting more efficient interstate communications.[6]

The Commission expressly found that state entry and rate regulation of CPE used jointly for interstate and intrastate communications would undercut the achievement of these objectives.[7] It accordingly preempted the states from regulating CPE "to the extent that their terminal equipment regulation is at odds with the regulatory scheme set forth."[8] However, the Commission

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3. 47 U.S.C. §§ 151 *et seq.* (1976 & Supp. IV 1980); *see Final Decision* ¶ 173, 77 F.C.C.2d at 451-52; *Reconsidered Decision* ¶¶ 28, 46, 148-50, 84 F.C.C.2d at 61, 65, 101-02.

4. *See Final Decision* ¶¶ 141, 143-44, 179, 77 F.C.C.2d at 439, 440, 453; *Reconsidered Decision* ¶¶ 149-50, 84 F.C.C.2d at 101-02.

5. *See Final Decision* ¶¶ 9, 145-59, 77 F.C.C.2d at 388, 441-46; *Reconsidered Decision* ¶¶ 46, 140-41, 84 F.C.C.2d at 65, 98-99.

6. *Final Decision* ¶¶ 160, 179-81, 77 F.C.C.2d at 447, 453-54; *Reconsidered Decision* ¶¶ 140-41, 84 F.C.C.2d at 98-99.

7. *Id.*; *Final Decision* ¶¶ 184-85, 77 F.C.C.2d at 455; *Reconsidered Decision* ¶¶ 155-57, 84 F.C.C.2d at 103-04. Since most CPE has been tariffed at the state level, even though it is used jointly for interstate and intrastate communications, the Commission's decision would have little effect if it eliminated only federal tariff requirements. *See id.*

8. *Reconsidered Decision* ¶ 154, 84 F.C.C.2d at 103; *Final Decision* ¶ 184, 77 F.C.C.2d at 455.

limited its preemption so as not to displace state regulation of CPE that was compatible with federal policy.[9]

The court of appeals denied petitions to review the deregulation of CPE and all other aspects of the Commission's decision. The court agreed that preemption of state rate and entry regulation of CPE was justified because such regulation would frustrate the lawful objectives of the Commission's decision to remove CPE from federal public utility regulation.[10] The Court held that the Commission's findings on this point were detailed and logical and that its conclusion was rational.[11] And it held that the Commission had acted within the scope of its statutory jurisdiction over interstate communications, because CPE is used for both interstate and intrastate communications.[12]

ARGUMENT

The petitioners raise only a narrow issue that does not warrant further review. Petitioners do not ask the Court to review the lawfulness of the Commission's underlying determination that CPE should be deregulated. The only issue they raise is the lawfulness of the Commission's conclusion that implementing that determination requires displacement of inconsistent state regulatory requirements. They have shown no reason why that issue merits review by this Court.

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9. For example, it left the states largely free to determine the manner in which regulated CPE now in use will be removed from a telephone company's rate base. *Further Reconsidered Decision* ¶¶ 29-35, 71, 88 F.C.C.2d at 522-24, 537.

10. *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982).

11. *Id.* at 215.

12. *Id.* at 215-17.

The case does not raise important or unresolved issues of federal law. The general principles governing federal preemption of inconsistent state regulatory programs are well established. State regulation must give way under the Supremacy Clause (i) if "compliance with both federal and state regulations is a physical impossibility," or (ii) if the state regulatory scheme stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[13] Rules lawfully promulgated by federal agencies have the same preemptive effect as federal statutes where this test is met.[14]

More specifically, the ground rules on preemption by the Commission of state regulation of CPE have been clearly established in a series of well-reasoned court of appeals decisions, principally decisions of the Fourth

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13. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Thus, state regulation is displaced whenever "the purpose of the federal statute would to some extent be frustrated by the state statute." *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963). The older case of *North Carolina v. United States*, 325 U.S. 507 (1945), on which petitioners rely, is not in point because it turned on an interpretation of particular provisions of the Interstate Commerce Act not present in the Communications Act.

14. *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 50 U.S.L.W. 4916 (U.S. June 28, 1982); *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979); *Free v. Bland*, 369 U.S. 663, 668 (1962).

Circuit.[15] The Fourth Circuit twice upheld the Commission's authority to prescribe rules for the attachment of noncarrier-provided CPE to the telephone network and to displace any conflicting state rules. Certiorari was twice denied. Those decisions confirm the Commission's authority to override state rules that conflict with federally established policy with respect to facilities used for both interstate and intrastate service.

The court below properly applied these principles. It correctly sustained the Commission's finding that state public utility regulation of CPE would frustrate the Commission's objectives in deregulating CPE, and held that the Commission's decision to deregulate CPE was within its authority under the Communications Act. Contrary to petitioner Louisiana Public Service Commission's argument, the fact that the issue is one of preemption does not render irrelevant the normal limits on judicial review of agency action.[16]

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15. *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

The Commission's authority to regulate facilities used for interstate communications regardless of their relative interstate or intrastate use has been upheld in many contexts. *E.g.*, *New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980); *People of the State of California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1010 (1978); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 700 (1st Cir. 1977).

16. In *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, *supra*, the Court reaffirmed that

> "[f]ederal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily."

50 U.S.L.W. at 4919.

Petitioner NARUC's argument that the decision below conflicts with the Fourth Circuit cases is without merit. Both the Fourth Circuit cases and the decision below upheld assertions of Commission jurisdiction over CPE used jointly in interstate and intrastate communications. Both upheld preemptions of state rules that were inconsistent with federal rules regarding such equipment. Petitioner's argument that here, in contrast to the Fourth Circuit cases, the Commission has impermissibly displaced state ratemaking authority is, as the court below pointed out, simply without basis.[17] The Commission neither attempted to set rates for intrastate communication services, nor asserted jurisdiction to regulate matters of purely state concern. While the Commission's action indirectly affects rates because it removes assets from a telephone company's rate base, that indirect effect is not an impermissible preemption of state ratemaking authority. The Commission's action here has no more of an effect on state ratemaking than did the Commission actions sustained by the Fourth Circuit.

17. 693 F.2d at 216.

CONCLUSION

For these reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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